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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

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STATE OF NEW JERSEY, *Plaintiff*,

vs.

STATE OF NEW YORK AND THE CITY OF NEW YORK,
Defendants.

MOTION TO SET CASE FOR HEARING ON BILL AND ANSWER.

WILLIAM A. STEVENS,
Attorney General,
DUANE E. MINARD,
Assistant Attorney General.

JAMES M. BECK,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 17, Original.

STATE OF NEW JERSEY, *Plaintiff*,

vs.

STATE OF NEW YORK AND THE CITY OF NEW YORK,
Defendants.

MOTION TO SET CASE FOR HEARING ON BILL AND ANSWER.

Comes now the plaintiff, the State of New Jersey, by its counsel of record, and respectfully moves the Court to set down the above entitled cause for hearing on Bill and Answer and, in support of such motion, submits the following facts:

I. The complainant brought this original action against the State of New York and the City of New York on the 13th day of May, 1929, and prayed for an injunction to restrain the said defendants from diverting the waters of the upper Delaware and its tributaries into another watershed to the injury of the navigable capacity of the Delaware

River without first obtaining the consent of the United States and of the complainant and other riparian states.

II. The defendant, the City of New York, on the 14th day of October, 1929, filed its amended answer whereby *inter alia* it averred, in paragraph 19 of the answer, that the bill of complainant "does not state facts sufficient to constitute a cause of action in equity, nor any matter of equity entitling the plaintiff to the relief prayed for or to any relief nor are the facts stated in the Bill of Complaint sufficient to entitle the plaintiff to any relief against the defendant."

III. The said answer thereupon proceeds to set up an affirmative defense (Paragraphs 28 to 34, inclusive), which admits the essential allegation of the complainant's bill in equity to the effect that the City of New York, acting under the laws of the State of New York, intends to take from the upper Delaware and its tributaries and to divert to the City of New York in another watershed at least six hundred million gallons each day of the water which now, in the course of nature, flows down the Delaware and into Delaware Bay.

IV. The answer (Paragraph 34) admits its intention to appropriate these waters, *sotre* the same and thereby in its discretion and by its sole action to increase and augment the flow in the Delaware River in the season of the year constituting the dry season, and at other times to decrease and lessen the flow of the Delaware River in order to divert it to New York City for the use of its people.

V. It admits that it sought to obtain the consent of the other riparian states, namely, New Jersey and Pennsylvania, but that both states failed by appropriate legislative

act to accept the allocation of waters which the State of New York and the City of New York proposed.

VI. Having thus admitted the substance of complainant's allegations, it proceeds (Paragraph 36) to aver that the intended use of this great volume of water is "so urgent and pressing that it can no longer delay in proceeding without great risk to the future prosperity, health and even existence of its citizens and residents," and it avers its intention to appropriate this water without any compact between the said states because its effort "to compose this matter has been prevented by causes beyond its control and outside its knowledge."

VII. The said answer admits (Paragraph 31) its purpose to divert six hundred million gallons daily into five great reservoirs, a portion of which will be diverted into another watershed for the use of the people of New York City and a portion to be used "for the specific purpose of increasing and augmenting the flow in the Delaware River during every dry season and on every dry day of every year." (Par. 31, page 19). The defendant thus admits its purpose to alter and modify the navigable capacity of the Delaware River by a diversion at all times of a certain portion thereof to the City of New York and by at times augmenting and at times diminishing the navigable depths of the Delaware River through the storage of such waters in reserviors.

The defendant nowhere avers that, in thus modifying the navigable capacity of the Delaware River, it has obtained the consent of the United States to such modification, in accordance with the provisions of Section 10 of the Act of March 3, 1899, whereby Congress prohibited "the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters

of the United States," and further provided that it was "unlawful to alter or modify . . . the channel of any navigable waters of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War *prior to beginning the same.*"

The failure of the defendant in its answer to aver either the application for such a permit, or the granting thereof, clearly indicates the intention of the defendant to proceed with the work without complying with this statutory prerequisite of the United States, as the paramount authority over navigable waters. No such permit has been granted and, so far as complainant knows, none has even been applied for.

VIII. As the defendant thus admits that its intention is to alter the navigable capacity of the Delaware River in plain violation of the said Act of Congress without any compact between the riparian states as to the equitable allocation of the said waters, the said defendants, it is respectfully submitted, have formally admitted the substantial averments of the complainant's bill and only challenged their legal sufficiency.

IX. On the 25th day of November, 1929, the defendant, the City of New York, without any notice to complainant, submitted a motion in the above entitled case for the appointment of a Special Master. Counsel for complainant, who, as stated, had no knowledge of the intended submission of such motion, was in Court and, to prevent any action upon such motion until the Court could consider an alternative motion, submitted orally this Motion to set the case for hearing on Bill and Answer.

By Reason Whereof and for the reasons more particularly stated in the brief memorandum submitted appended

to this motion the complainant respectfully submits that the motion for a Special Master should be denied at this time and that, in lieu thereof, the case should be set down for hearing on bill and answer to determine whether the affirmative and admitted allegations of the defendants to appropriate this water, without either the consent of the complainant or of the United States, does not justify this Court in determining at this time the sufficiency of the said affirmative defense and, if the said affirmative defense be insufficient, the granting of a permanent injunction, or, in the alternative, a preliminary injunction.

All of which is respectfully submitted.

WILLIAM A. STEVENS,
Attorney General,
DUANE E. MINARD,
Assistant Attorney General.

JAMES M. BECK,
Of Counsel.

MEMORANDUM ON MOTION.

Counsel for the plaintiff appreciate that ordinarily this Court is disinclined to determine any litigation between the States upon bill and answer, unless the answer admits the substantial averments of the bill, or raises a question of law of a fundamental nature, which, if decided against the defendants, would dispose of the case.

To refer this case to a Special Master means prolonged delay and a lengthy record of relevant and irrevelant testimony. Upon such a reference, there would necessarily be lengthy testimony upon many collateral matters, such as the necessities of the City of New York, its ability to get its drinking water elsewhere, the extent to which the navigable capacity of the Delaware River would be improved or impaired, and the extent of the injury to the riparian states and the peoples thereof. Such testimony would probably require a long period of time to take and would be a very heavy financial burden to the litigating states. Moreover, such delay would defeat the announced intention of the City of New York to proceed with the appropriation of these waters, for if, pending the progress of the litigation, the City of New York proceeds to expend many millions of dollars for the purpose of diverting these waters from one watershed to another and thereafter this Court should decide that such appropriation, without the consent of the United States and of the riparian states, is unlawful, the City of New York in that event might thereby suffer not only a loss of time, but also a heavy financial loss.

Moreover, if the case be set down for hearing on bill and answer and if the Court should conclude that this case could not be disposed of on bill and answer, yet both parties to the litigation might have the benefit of the direction of this Court as to the proper scope of the inquiry, which would

not only mean a great saving of time and money to the parties to the litigation, but it would also save the time of this Court in considering hereafter a record, which, in the absence of some direction as to the scope of the inquiry, might mean an examination of lengthy testimony of an irrelevent character.

We respectfully submit that under the express provisions of the Act of March 3, 1899, and the pertinent decisions of this Court thereunder (*Sanitary District* v. *U. S.*, 266 U. S. 405; *State of Wisconsin* v. *Sanitary District*, 270 U. S. 634), that the United States, as the trustee of the navigable waters of the United States, has expressly forbidden the intended action of the defendants.

The language of said Act could not be more explicit and yet the defendants, as stated in our motion, without any pretense that they have obtained the consent of the War Department, announce in their answer their intention to "alter and modify" the channel of the Delaware River by withholding from it through the greater part of the year six hundred million gallons of water per day and at other times of the year (the so-called "dry" season) to return to the channel waters, which of natural right and the course of nature, belong to that river at all times.

It is true that the answer does not affirmatively aver the failure of the City of New York to obtain the consent of the War Department, but the Court will assume that, if such consent had been obtained, or even applied for, it would have been averred in the answer as the justification for the proposed act of the defendants.

Similarly, the answer avers that the defendants attempted by a formal compact between the states to obtain the consent of the State of New Jersey to such diversion of the waters, but it wholly fails to state that the State of

New Jersey has ever ratified such a compact, or that the United States has given its consent to such compact.

In view of this avowed intention of the defendants to proceed to divert the waters to another watershed for the benefit of the City of New York without the consent either of the United States or the other riparian states, it would seem futile for this Court to impose upon the complainant state the great expense and the prolonged delay of taking testimony upon many collateral and irrelevant matters, when the essential averments of the complant are admitted by the defendants and only their legal sufficiency is denied by the defendants. The defendants by their answer challenge the authority of the United States and of the complainant state and for this reason we respectfully submit that the Court should order the case for an early hearing and upon such hearing, unless the defendants can justify their intended purpose to appropriate these waters and regulate the navigable capacity of the Delaware River, a permanent injunction should be granted.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney General,
DUANE E. MINARD,
Assistant Attorney General.

JAMES M. BECK,
Of Counsel.